

## Wage and Hour Division, Labor

## § 793.13

purposes of the section 13(b) (9) exemption provided that he performs the duties described above and is properly licensed by the Federal Communications Commission. Where two or more engineers are employed by a station, only one may qualify as “chief engineer”—that one who, on the basis of the factual situation, is in charge of the engineering work.

### § 793.10 Primary employment in named occupation.

The legislative history of the exemption is explicit that the exemption applies only to an employee who is employed “primarily” as an announcer, news editor, or chief engineer. Thus the Senate Report states: “The exemption is specifically limited to those employees who are employed primarily in the named occupations \* \* \*” (S. Rept. 145, 87th Cong., 1st sess., p. 37). No specific rule can be established for determining whether in any given case an employee is employed “primarily” in the named occupations. Generally, however, where an employee spends more than half of the hours he works in a workweek in a named occupation, he will be considered to be primarily employed in such occupation during that workweek. The answer will necessarily depend upon the facts in each case.

### § 793.11 Combination announcer, news editor and chief engineer.

The 13(b)(9) exemption, as was made clear during the debate on the amendment, is intended to apply to employees employed in the named occupations by small market radio and television stations. It is known at the time of such debate that these stations employ only a small number of employees and that, at times, an employee of such a station may perform a variety of duties in connection with the operation of the station. For example, an employee may perform work both as an announcer and as a news editor. In such cases, the primary employment test under the section 13(b)(9) exemption will be considered to be met by an employee who is employed primarily in any one or any combination of the named occupations. Thus an employee who works both as an announcer and news editor for the greater part of the workweek

will be considered to be primarily employed in the named occupations during that week.

### § 793.12 Related and incidental work.

An employee who is employed primarily in one or more of the named occupations may also be engaged in other duties pertaining to the operation of the station by which he is employed. The Senate Report states that, for purposes of this exemption, employees who are primarily employed in the named occupation “may engage in related activities, including the sale of broadcasting time for the broadcasting company by which they are employed, as an incident to their principal occupation”, (S. Rept. 145, 87th Cong., 1st sess., p. 37). Time spent in such duties will not be considered to defeat the exemption if the employee is primarily employed in the named occupations and if the other requirements of the exemption are met.

### § 793.13 Limitation on related and incidental work.

The related work which an employee may perform is clearly limited in nature and extent by a number of requirements. One limitation is that the work must be an incident to the employee's primary occupation. The work therefore may not predominate over his primary job. He is not “employed as” an announcer, news editor, or chief engineer if his dominant employment is in work outside such occupations (see *Walling v. Haden*, 153 F. 2d 196, cert. denied 328 U.S. 866). For instance, an announcer who spends 40 hours of his 48 hour workweek in selling broadcasting time would not be considered to be “incidentally” engaged in such selling. Selling would in such circumstances be his primary occupation. His duties as an announcer must constitute his primary job. Another requirement is that the work of the employees must be performed “for the broadcasting company by which they are employed \* \* \*” (see S. Rept. cited in § 793.12). Sale of broadcasting time for a company which does not employ the employee as an announcer, news editor, or chief engineer, is not exempt work. Work which is not performed for the station by which the employee is employed, is not intended

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to be exempt. For a discussion of the effect on the exemption of nonexempt work see §§ 793.19 to 793.21.

### § 793.14 Employed by.

The application of the exemption is limited to employees “employed by” a radio or television station. The question whether a worker is employed “by” a radio or television station depends on the particular facts. (See *Rutherford Food Corporation v. McComb*, 331 U.S. 722; *U.S. v. Silk*, 331 U.S. 704.) In general, however, an employee is so employed where he is hired by the radio or television station, engages in its work, is paid by the radio or television station and is under its supervision and control. Employees of independent contractors and of others who work for a radio or television station but who are not “employed by” such station are not exempt under this exemption even if they engage in the named occupation. (*Mitchell v. Kroger*, 248, F. 2d 935.)

### § 793.15 Duties away from the station.

An employee who is “employed by” a radio or television station in one or more of the named occupations may perform his work at the station or away from the station so long as his activities meet the requirements for exemption.

### § 793.16 “Radio or television station.”

The employee must be employed by a “radio or television station.” A radio or television station is one which is designated and licensed as such by the Federal Communications Commission.

### § 793.17 “Major studio.”

The exemption further depends on whether “the major studio” of the radio or television station which employs the employee is in a city or town as defined in section 13(b)(9). The location of secondary studios of the radio or television station is immaterial. It is the location of the “major” studio that determines the qualification of the employer for the exemption. A major studio for purposes of the exemption is the main studio of the radio or television station as designated on the station’s license by the Federal Communications Commission. It is this

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major studio which must be located in the city or town as defined in section 13(b)(9) of the Act.

### § 793.18 Location of “major studio.”

Section (b)(9) specifies that the “major studio” must be located “(A) in a city or town of one hundred thousand population or less according to the latest available decennial census figures as compiled by the Bureau of the Census, except where such city or town is part of a standard metropolitan statistical area, as defined and designated by the Bureau of the Budget, which has a total population in excess of one hundred thousand or (B) in a city or town of twenty-five thousand population or less, which is part of such an area but is at least 40 airline miles from the principal city in such area.” These tests may be summarized as follows:

(a) *A city or town with more than 100,000 population.* The exemption does not apply to any employee of a radio or television station the major studio of which is located in any city or town with a population in excess of 100,000.

(b) *A city or town with 100,000 population or less.* The exemption may apply if the major studio is located in a city or town of not more than 100,000 population: *Provided*, That the city or town is not within a standard metropolitan statistical area which has more than 100,000 population.

(c) *A city or town with 25,000 population or less.* The exemption may apply even if the major studio is located in a city or town that is within a standard metropolitan statistical area which has more than 100,000 population: *Provided*, That such city or town has a population or not more than 25,000 and the city or town is at least 40 airline miles from the principal city in such area.

(d) *Sources of information.* The Bureau of the Budget issues periodically a booklet entitled “Standard Metropolitan Statistical Areas”, which lists and describes these areas in the United States and Puerto Rico. The booklet lists the standard metropolitan statistical areas by name and shows their population according to the latest available decennial census figures as compiled by the Bureau of the Census. The booklet also lists the major cities